Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
	)	

COMMENTS OF THE NATIONAL LIFELINE ASSOCIATION

The National Lifeline Association[1] (NaLA) respectfully submits these comments on the Notice of Proposed Rulemaking (NPRM) released by the Commission on May 31, 2019 to "seek comment on establishing a cap on the Universal Service Fund (USF or Fund) and ways it could enable the Commission to evaluate the financial aspects of the four USF programs in a more holistic way…."[2] As the Commission notes in the NPRM, "each of the constituent USF programs are capped or operating under a targeted budget…."[3] Therefore, there is no need to cap the Fund as a whole. NaLA continues to support implementation of a self-enforcing budget mechanism for the Lifeline program under certain conditions.[4] However, NaLA does not support pitting USF programs against each other based on arbitrary measures of cost-effectiveness or estimated improper payment rates that can be arbitrary and misleading.

[1] NaLA is the only industry trade group specifically focused on the Lifeline segment of the communications marketplace. It supports eligible telecommunications carriers (ETCs), distributors, Lifeline supporters and participants and partners with regulators to improve the program through education, cooperation and advocacy. *See* https://www.nalalifeline.org/.

[2] *Universal Service Contribution Methodology*, WC Docket No. 06-122, Notice of Proposed Rulemaking, FCC 19-46 (rel. May 31, 2019) (NPRM).

[3] NPRM, ¶ 1.

[4] *See* Comments of NaLA, WC Docket Nos. 17-287, 11-42, 09-197 (Feb. 21, 2018) (NaLA 2018 Comments).

I. A Self-Enforcing Lifeline Budget Mechanism Should Operate on An Annual Basis, Have Prospective Impact Only and Retain Any Excess Money in Reserve for Lifeline

The NPRM references the Commission's previous proposal to replace the budget process adopted in the 2016 Lifeline Modernization Order with a self-enforcing budget that would require an annual cap for Lifeline disbursements.[5] As the Commission notes, Lifeline disbursements have decreased substantially in recent years, from a peak of $2.2 billion in 2012[6] to $1.537 billion in 2016,[7] to $1.263 billion in 2017, to $1.143 billion in 2018 and the available data for 2019 suggests that the downward trend is continuing.

There are many reasons for this decline. One primary reason is the regulatory uncertainty introduced by the Commission in the 2017 Lifeline Order and NPRM proposing to eliminate wireless resellers from the Lifeline program nationwide.[8] Although the Commission's decision to eliminate wireless resellers from the Tribal Lifeline program never was implemented and was vacated by the Court of Appeals for the District of Columbia Circuit earlier this year,[9] the Commission has not formally abandoned its proposal to eliminate resellers program-wide. Despite overwhelming opposition in the docket, the proposal continues to hang over the program and suppress capital investment nationwide. In addition, the Commission's implementation of the Lifeline National Verifier has resulted in the de-enrollment of thousands of individuals whose

---

5 *See* NPRM ¶ 8 (citing to *Bridging the Digital Divide for Low-Income Consumers et al.*, WC Docket Nos. 17-287, 11-42, 09-197, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 17-155, ¶¶ 105-110 (2017) (2017 Lifeline Order and NPRM).

6 *See* USAC, 2012 Annual Report, at 9, *available at* http://www.usac.org/_res/documents/about/pdf/annual-reports/usac-annual-report-2012.pdf.

7 *See* USAC, 2016 Annual Report, at 22, *available at* http://www.usac.org/_res/documents/about/pdf/annual-reports/usac-annual-report-interactive-2016.pdf.

8 *See* 2017 Lifeline Order and NPRM.

9 *See Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 915 F.3d 19 (D.C. Cir. 2019).

eligibility might have been verified but for delays in securing access to the national CMS Medicaid database and providing guidance on what constitutes acceptable proof of participation in SNAP. The National Verifier's now persistent lack of adequate eligibility database access combined with a horribly flawed reverification process threatens to take Lifeline away from eligible subscribers in most states.[10] Further, the National Verifier's lack of adequate eligibility database access and lack of a service provider application programming interface (API) serves as a barrier to program participation reducing new enrollments dramatically in states where the National Verifier has been hard launched. Finally, annual increases to the Lifeline broadband and voice minimum service standards have decimated profit margins and suppressed investment necessary to support enrollment activities and to increase subscribership.[11]

Nevertheless, NaLA understands and appreciates the Commission's interest in budgeting for the costs of the Lifeline program. Moreover, NaLA understands that there are concerns with the current structure, which does not have an affirmative mechanism for controlling costs, but provides that "[i]f spending in the Lifeline program meets or exceeds 90 percent of the Lifeline budget in a calendar year, the Wireline Competition Bureau shall prepare a report evaluating program disbursements and describing the reasons for the program's growth along with any other information relevant to the operation of the Lifeline program."[12] However, if the Commission

---

[10] *See* National Lifeline Association Notice of Oral *Ex Parte* Presentation; WC Docket Nos. 17-287, 11-42 and 09-197 at 2-4 (Apr. 4, 2019) (NaLA *Ex Parte*). Note that the reverification process is different from the annual recertification process. The annual recertification process has been in place since 2012 and does not require subscribers to provide proof of eligibility again (which they did at enrollment). The reverification process was created by the Commission and the Universal Service Administrative Company to verify subscribers' eligibility in each state as the National Verifier rolls out. It requires that subscribers be found in an eligibility database or provide proof of eligibility to retain their Lifeline service.

[11] *See* NaLA *Ex Parte* at 5-6.

[12] 47 C.F.R. § 54.423(b).

chooses to implement changes to the budget structure, the Commission must allow for program growth because with an estimated participation rate of approximately 22 percent,[13] the Lifeline program is far from maximizing its potential to address the affordability gap that perpetuates the digital divide and leaves many low-income Americans without consistent monthly access to affordable voice and broadband.[14] Moreover, in recent years the Lifeline program has been artificially restricted as discussed above. Therefore, NaLA agrees with NARUC's support for the current budget amount of $2,279,250,000.[15] Through this lens, NaLA herein offers feedback on the proposals in the NPRM.

One central issue in the Commission's cap proposal is the appropriate period over which the Commission should measure and enforce the cap.[16] NaLA respectfully submits that if the Commission is going to adopt a new budget mechanism, it should implement a budget cycle of at least 12 months. An annual budget is the minimum period necessary for ETCs to make sound business and investment decisions, including service plan design and innovation, device procurement, staffing, and distribution.[17] For example, neither ETCs nor Lifeline subscribers could adequately plan for or effectively administer the six-month alternative set forth in the 2017 Lifeline

---

[13] According to Lifeline industry consultant CGM, LLC, which collects data from the Universal Service Administrative Company.

[14] *See* NARUC 2018 Lifeline Resolution ("Resolved that NARUC urges the FCC, in any budget it sets for the Lifeline program that it carefully balance…that there is reasonable and rational growth in the Lifeline fund…").

[15] *See id*.

[16] NPRM ¶ 13.

[17] Indeed, Chairman Pai recently acknowledged that universal service support should help create stability for program participants rather than uncertainty. *See* Letter from Ajit V. Pai, Chairman, Federal Communications Commission, to Hon. John Ratcliffe, U.S. House of Representatives, 2 (Dec. 19, 2017) (acknowledging that in the High Cost program, the current budget had created uncertainty for providers, and that he would ask his colleagues at the Commission to address the problem by "guaranteeing at least some minimum level of support to ease the unpredictability and allow reasonable capital planning").

Order and NPRM. Indeed, without the stability of a reasonable budget for the Lifeline program, service providers are likely to further scale back or shut down their operations, which will only further inhibit the ability of low-income consumers to access essential communications services through the program.

Additionally, the Commission should not adopt a budget enforcement mechanism whereby USAC is directed to forecast expected disbursements and expenses and "make administrative changes to reduce the size or amount of funding available to the individual program caps in an upcoming year if demand is projected to exceed the overall cap."[18] Such changes are not administrative and cannot be delegated to USAC.[19] Further, the budget mechanism should not include administrative expenses, as such expenses are not currently included in the budget for Lifeline or other universal service programs. Moreover, the proposed approach would create significant uncertainty in the Lifeline program because the forecast for disbursements and expenses could be incorrect and would detrimentally impact low-income consumers without even knowing if the program will exceed the cap. Indeed, the 2017 Lifeline Report and NPRM itself acknowledged that forecasts can be unreliable due to "inevitable under- or over-shooting of the actual demand."[20]

At least with respect to Lifeline, the Commission instead should implement an approach "that would allow Lifeline spending in a given period to exceed the cap."[21] If this occurs, rather than automatically reducing Lifeline disbursements during the next period,[22] the Commission should evaluate by a date certain what may have caused the higher-than-expected disbursements

---

[18] NPRM ¶ 18.

[19] *See* 47 C.F.R. § 54.702(c) ("The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.").

[20] 2017 Lifeline Order and NPRM, ¶ 107.

[21] *Id*.

[22] *See id*.

and administrative costs. For example, program spending may spike in a given year because of an economic downturn that results in more consumers being eligible for the program or in response to natural or man-made disasters or emergency situations.[23] Understanding whether spending in a given period was an anomaly or part of a general upward trend will allow the Commission to make better informed decisions about the Lifeline program budget on a prospective basis. Importantly, if after considering economic conditions, the Commission determines that steps must be taken to reduce Lifeline program expenditures, the Commission should give priority to cost-cutting measures that will have the least impact on low-income consumers. Any changes to the budget that would impact the per subscriber reimbursement amount would need to be applied only for new enrollments to avoid causing widespread uncertainty for consumers about their benefits. Moreover, if reimbursements were to be reduced for new enrollments, the Commission should allow for a corresponding decrease in the minimum service standard to avoid creating an adverse impact on the affordability of Lifeline supported services.

Finally, in each year when Lifeline expenditures come in under budget – a very real possibility given the current budget and disbursements, and the downward trend in Lifeline expenditures since 2012 – those savings should be rolled over, and be available for reinvestment in the Lifeline program to benefit low-income Americans. Rolling over unused universal service funds is not a novel concept. Indeed, the E-rate Program currently uses a mechanism for unused funds that ensures funds committed to an E-rate participant and collected from contributors is used

[23] *See, e.g.*, *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Order, DA 17-984, ¶¶ 10-16 (WCB rel. Oct. 6, 2017) (granting temporary waivers of the non-usage and recertification rules for consumers in Florida, Georgia, Puerto Rico, and the U.S. Virgin Islands who were impacted by Hurricanes Harvey, Irma and Maria).

in future years to reduce E-rate program demand.[24] The Commission adopted a similar rollover approach for the Rural Health Care program last year.[25] And in the High Cost program, the NPRM notes that "Any excess money collected is kept in reserve for CAF initiatives."[26] These precedents demonstrate the Commission's acknowledgement that, consistent with the Commission's duty to promote universal service as set forth in the Communications Act, unused USF support should be rolled over for future use that best serves the particular program's needs. In the Lifeline context, rolled over funds could be used, for example, for temporary adjustments to reimbursements (either by increasing the reimbursement amount or allowing consumers to qualify for the program using alternative eligibility programs). In addition, and perhaps most importantly, the rolled over funds could be used to cover future budget overruns so that low-income consumers need not be impacted if, for example, the Lifeline program exceeds the budget cap in a year after it had been under budget.

II. The Commission Should Not Prioritize Among the Programs Based on Cost-Effectiveness or Estimated Improper Payment Rates

The Commission seeks comment in the NPRM on how to prioritize among the programs if faced with projected disbursements exceeding the overall cap.[27] The Commission suggests that it might prioritize "based on the cost-effectiveness of each program or the estimated improper payment rate."[28] Fortunately, the Commission also considers reducing each program's

---

[24] 47 CFR § 54.507(a)(5) ("All funds collected that are unused shall be carried forward into subsequent funding years for use in the schools and libraries support mechanism in accordance with the public interest and notwithstanding the annual cap.").

[25] *See Promoting Telehealth in Rural America*, WC Docket No. 17-310, Report and Order, FCC 18-82, ¶ 25 (2018).

[26] NPRM, ¶ 5.

[27] *See* NPRM, ¶ 19.

[28] *Id*.

disbursements by the same amount, which if applied proportionally is an alternative that does not pit programs against each other.[29]

Cost-effectiveness is not an appropriate prioritization consideration because the Commission claims to have a measure of program effectiveness for the high-cost, low-income and schools and libraries programs, but then notes that it doesn't actually have one for the Lifeline program and has directed USAC to work with an independent, third-party evaluator to complete an evaluation of the program.[30] Further, the cost-effectiveness measures are different (e.g., high-cost is partly by telephone penetration rates and E-rate is by prices paid as a function of bandwidth)[31] and not easily comparable, and would require the Commission to choose between the laudable goals of each program. The fact that one program is slightly more cost-effective by one measure does not necessarily mean that it is more important than another program that is slightly less cost-effective by a different measure. The Commission would need to evaluate whether, for example, the high-cost program effectively providing services to wealthy mountain homes is more important than supporting affordable communications for low-income consumers in both rural and urban areas. The cost-effectiveness of a program does not necessarily always match up with the societal value of the program and it is therefore not an appropriate prioritization consideration.

In addition, the estimated improper payment rate is often arbitrary and misleading and would not be useful for prioritizing program cuts. For example, the Lifeline program's traditionally very low estimated improper payment rate spiked for the last two years because USAC started counting allegedly imperfect disclosures on certification forms as potential improper payments,

---

[29] *Id*.

[30] *See id*., n.38.

[31] *See id*.

which does not indicate that the applicant or subscriber was not eligible for the program.[32] The Commission has required since July 2018 that all Lifeline providers use standardized application and recertification forms. Therefore, the reason for the spike has already been addressed.

III. Conclusion

Since all of the USF programs already operate under a cap or budget, there is no need to cap the Fund as a whole other than to take from one program to serve another program. NaLA continues to support implementation of a self-enforcing budget mechanism for the Lifeline program under certain conditions.[33] However, NaLA does not support pitting USF programs against each other based on arbitrary measures of cost-effectiveness or often misleading estimated improper payment rates.

---

[32] Lifeline's estimated improper payment rate in 2016 was 2.93 percent. FCC FY 2016 Agency Financial Report at 5. In 2017, it spiked to 21.93 percent. *See* FCC FY 2017 Agency Financial Report at 86. Tables 2 and 2.2 in the FY 2017 Financial Report (pages 76-77), show that $299.92 million of the total $336.39 million in estimated improper payments was due to "Inadequate Certifications" which are not dispositive of subscriber eligibility. $299.92 million is 89.16% of the total improper payment. For the most recent numbers, in 2018 the estimated improper payment rate reduced to 18.47 percent. *See* FCC FY 2018 Agency Financial Report at 91. The relative percentage of improper payments due to allegedly improper certifications was even higher. Tables 2 and 2.1 of the FY 2018 Financial Report (page 82), shows that $221.71 million of the total $227.02 million in improper payments is due to "Missing Certifications" ($7.68 million) or "Inadequate Certifications" ($214.03 million). That $221.71 million is 97.66% of the improper payments (18.04% out of the 18.47%) and, that will be eliminated as audits reflect the use of the universal standardized forms. That would leave only a 0.43% improper payment rate.

[33] *See* Comments of NaLA, WC Docket Nos. 17-287, 11-42, 09-197 (Feb. 21, 2018) (NaLA 2018 Comments).

Respectfully submitted,

By: ______________________________

John J. Heitmann
Joshua Guyan
KELLEY DRYE & WARREN LLP
3050 K Street NW, Suite 400
Washington, D.C. 20007
(202) 342-8400 (voice)
(202) 342-8451 (facsimile)
jheitmann@kelleydrye.com

Counsel for the National Lifeline Association

July 29, 2019